A **ASHBY CONSTRUCTION SDN BHD**

v.

BANK NEGARA MALAYSIA

B HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[SUIT NO: 22NCVC-150-2011]
11 SEPTEMBER 2013

C ***CIVIL PROCEDURE:*** *Striking out - Application for - Purchaser of properties charged for money-laundering under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 - Freezing and seizure order issued by Bank Negara Malaysia ('BNM') on properties - Vendor developer sued BNM for misfeasance and abuse of powers - Whether* D *vendor disclosed reasonable cause of action - Whether properties already became assets of purchaser - Whether action frivolous, vexatious and abuse of court process - Rules of Court 2012, O. 18 r. 19(1)(a), (b) and (d)*

E The plaintiff had a dealing with Mercantile Point Sdn Bhd ('Mercantile') with respect to the sale of 215 titles of properties, which the plaintiff was developing, known as Ipoh Country Park, Ipoh. It transpired that Mercantile had been charged for money-laundering under the Anti-Money Laundering and Anti-Terrorism F Financing Act 2001 ('AMLATFA') and that the defendant had exercised its vast powers under the AMLATFA to freeze the assets of Mercantile which included the 215 titles. The plaintiff contended that the 215 titles had not become the assets of Mercantile as only the sale and purchase agreements ('SPAs') were signed on 30 October 2007 with 40% of the purchase price G amounting to RM8.95 million of RM21,143,496 had been paid. The 215 titles had been charged to Bank Pertanian Malaysia. Mercantile had not been able to pay the balance purchase price by the completion date of 30 April 2008 and the plaintiff had decided to terminate the SPAs and forfeit 10% of the purchase H price. The plaintiff pleaded that it was unaware of the defendant's money-laundering activities. The plaintiff thought that after the expiry of 90 days from the date of the freezing order, since neither the plaintiff nor any of its directors were charged for an offence under the AMLATFA, the freezing order would expire and I that as a developer, the plaintiff would be at liberty to dispose of the 215 titles to any purchasers so as to realise its investments. However, after the expiry of the freezing order, the defendant

proceeded with a seizure order over the 215 titles such that the plaintiff could not deal with them in any way. Pressure mounted further as the bank has threatened to go for an order for sale if the loans secured against the 215 titles were not re-paid. Mercantile and its directors had been convicted under the AMLATFA by the Sessions Court. The plaintiff made representations to the defendant, appealing for the release of the 215 titles from seizure but to no avail. Thus, the plaintiff sued the defendant for misfeasance and abuse of its powers in having acted *mala fide* and in excess of the powers conferred on it by the AMLATFA in issuing the seizure order when neither the plaintiff nor any of its directors have been charged for an offence under the AMLATFA. The plaintiff prayed for a declaration that the freezing order and/or seizure order was invalid under the law and was issued *mala fide* and for damages arising out of the inability of the plaintiff to deal with the subject matter properties and for loss of business reputation and inability to complete a housing project called Ipoh Country Club. On the other hand, the defendant applied under O. 18 r. 19(1)(a),(b) and (d) of the Rules of Court 2012 to strike out the plaintiff's claim that it did not disclose a reasonable cause of action, and that it was frivolous and vexatious and an abuse of court process.

Held (dismissing defendant's claim for striking out with costs):

(1) The question of whether the defendant had acted in good faith or that it had exercised its powers unreasonably or even exceeded its powers could only be decided after parol evidence was adduced at the trial. It could not be confidently said that the plaintiff was bound to fail at the trial and that the instant action should be terminated by striking out at the present stage. Even if it be an uphill task for the plaintiff to prove that the defendant had acted *mala fide*, there was no justification for striking out the suit at this stage. (paras 18 & 22)

(2) Section 54(3) does not prohibit the plaintiff's action in challenging the legality of the scope of application of the freezing and/or seizure order. To allow such an interpretation would be to remove the exercise of such a power from the scrutiny of the courts altogether. Section 54(3) must be read subject to s. 77 where even the cloak of immunity would only

A cover circumstances where the exercise of the vast powers by the defendant under the AMLATFA has been in good faith. (para 24)

(3) Whilst the competent authority or enforcement agency under B the AMLATFA was presumed to have acted in good faith, the presumption was rebuttable. It could not be said that the plaintiff had not proceeded in good faith or that it had abused the process of court by bringing the action which was essentially an action in tort whether it be for negligence or C misfeasance on the part of the defendant. Although it might be difficult for the plaintiff to succeed at the trial to show a lack of *bona fide* on the part of the defendant, it was not sufficient cause for striking out the suit. The plaintiff's grievance was genuine for it had no knowledge for how long D it would have to wait before the subject-matter properties could be released from the order. Whether or not the defendant's action or inaction was completely above board and *bona fide* was something that the plaintiff was legitimately and legally entitled to call upon the court to scrutinise. (paras 28-E 30)

(4) The plaintiff's claim was for recovery of the 215 titles which were registered in the plaintiff's name and where the SPAs for the purchase of the properties had been terminated. The continued enforcement of the seizure order had the effect of F paralysing the plaintiff's business as a developer. It could not discharge the charge over the properties and would not be able to sell the properties to other purchasers. The plaintiff would continue to suffer under the seizure order and the opportunity to make representation under a forfeiture G proceeding under the AMLATFA had not begun. Its stand that the defendant's refusal to relent was an abuse of its powers under the AMLATFA in that the defendant has acted *mala fide* was a matter for the plaintiff to be allowed to proceed and prove at the trial. (para 37) H

(5) Even assuming that the various allegations of misfeasance on the part of the defendant were true, the plaintiff's claim was not obviously unsustainable or that it was plain and obvious that it should be struck out. Whether or not the defendant I had exceeded its powers or exercised it unreasonably and was

thus *mala fide*, was a matter that could only be established at the trial where the defendant's evidence would be subjected to cross-examination. Whilst s. 61 might be available to an innocent third party to make representations against the forfeiture of his properties, in this case it was not available as there had been a stay of the sentence passed on the accused persons including a stay of the forfeiture order. (para 40)

(6) The plaintiff was entitled to turn to the court to interpret the scope of the relevant provisions on freezing order, seizure order and forfeiture order and to determine if the defendant had exceeded its powers under the relevant provisions of the AMLATFA. Whether it could obtain the declaration or succeed in claiming the damages was to be left for trial. It prayed primarily for the seizure order to be lifted so that it may proceed with its normal business of being able to dispose the 215 titles. Hence, the plaintiff's suit could not be said to be an abuse of the process of the court. (para 42)

(7) Even if the plaintiff's claim was not elegantly worded, the plaintiff may still apply for leave of the court to amend the pleadings accordingly. Whether or not the plaintiff must suffer the whole of the subject-matter properties to be forfeited or to be the subject of a forfeiture proceeding was something that the defendant has to justify at the trial to show if it had acted *bona fide* in all the circumstances of the case taking all relevant factors into consideration. (para 48)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Ashley v. Chief Constable of Sussex Police (Sherwood intervening) [2008] 2 WLR 975 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

City Growth Sdn Bhd & Anor v. The Government of Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Khor Peng Chai & Ors v. Bank Negara Malaysia & Anor [2012] 4 CLJ 987 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 HC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4, 29, 44, 50(1), 51, 54(3), 55, 56, 61(4), 77
Law Reform (Miscellaneous Provisions) Act 1934, s. 1(1)
Rules of the High Court 1980, O. 53
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 32 r. 2

For the applicant/defendant - Jasmina Mokhtar; Litigation Unit, Bank Negara Malaysia
For the respondent/plaintiff - Shivdev Singh; M/s LH Singh & Co

Reported by Emm Zehra

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiff said it had the misfortune of dealing with a company called Mercantile Point Sdn Bhd with respect to the sale to them of 215 titles of properties which the plaintiff was developing known as Ipoh Country Park, Ipoh. The purchase price for all the 215 titles was RM21,143,496 and only 40% of the purchase price amounting to RM8.95 million has been paid. The purchaser could not pay the balance purchase price of RM12,193,496. The 215 titles have been charged to Bank Pertanian Malaysia and the amount outstanding as at 31 May 2011 is RM16,462,327.

[2] It transpired that Mercantile Point Sdn Bhd had been charged for money-laundering under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) and that the defendant had exercised its vast powers under AMLATFA to freeze the assets of Mercantile Point Sdn Bhd which included the 215 titles (the subject matter properties). The plaintiff contended that the 215 titles have not become the assets of Mercantile Point Sdn Bhd as only the sale and purchase agreements (S&Ps) have been signed on 30 October 2007 with 40% of the purchase price paid. Mercantile Point Sdn Bhd has not been able to pay the balance purchase price by the completion date of 30 April 2008 and the plaintiff has decided to terminate the S&Ps and forfeit 10% of the purchase price.

[3] The plaintiff pleaded and indeed said in its affidavit filed that it was unaware of the defendant's money-laundering activities. The plaintiff thought that after the expiry of 90 days from the date of the Freezing Order, since neither the plaintiff nor any of its directors were charged for an offence under AMLATFA, the Freezing Order would expire and that as a developer, the plaintiff would be at liberty to dispose of the 215 titles to any purchasers so as to realise its investments.

Problem

[4] However that was not to be. The defendant after the expiry of the freezing order proceeded with a seizure order over the 215 titles such that the plaintiff cannot deal with them in any way. Pressure mounted further as the bank has threatened to go for an order for sale if the loans secured against the 215 titles are not repaid.

[5] Meanwhile Mercantile Point Sdn Bhd and its directors have been convicted under AMLATFA before the Sessions Court. The Sessions Court granted a stay of the sentence pending the appeal to the High Court. The plaintiff found themselves in a quandary. It could not dispose of any of the 215 titles and without the cash flow from the sale, it has fallen into default where its loans to the bridging financier is concerned. It now faces the brunt of the bank's action in an impending foreclosure proceeding as well as an action against its directors as guarantors.

[6] What could it do? This is not a case where the plaintiff or any of its directors have been charged let alone convicted of money-laundering. It is a defaulting purchaser of the titles of the plaintiff that has been charged together with its directors. It decided to make representations to the defendant, appealing to its good office to release the 215 titles from seizure. That had not yielded the desired result and so it decided that it had no choice but to sue the defendant for misfeasance and abuse of its powers in having acted *mala fide* and in excess of the powers conferred on it by AMLATFA in issuing the seizure order when neither the plaintiff nor any of its directors have been charged for an offence under AMLATFA.

A

Pleadings

[7] The plaintiff prayed for a declaration that the freezing order and/or seizure order is invalid under the law and was issued *mala fide* and for damages arising out of the inability of the plaintiff to
B deal with the subject matter properties and for loss of business reputation and inability to complete a housing project called Ipoh Country Club.

[8] The plaintiff particularised the *mala fide* actions of the
C defendant as follows:

(a) The defendant has caused the subject matter properties to be frozen and/or seized in the belief that the plaintiff has committed an offence when in reality the plaintiff has no knowledge nor is it a party or privy to the offence said to
D have been committed by the purchaser Mercantile Point Sdn Bhd and the defendant has thus acted *mala fide*;

(b) The defendant has caused the subject matter properties to be frozen and/or seized in the belief that the plaintiff has
E committed an offence under s. 4(1) of AMLATFA when the plaintiff is not aware of having committed any offence and has not been charged and the defendant has thus acted *mala fide*;

(c) The defendant has abused its powers under AMLATFA by freezing and seizing the subject matter properties belonging to
F the plaintiff without reasonable cause and has thus acted *mala fide*;

(d) The defendant has used its powers under AMLATFA in a way not provided for under AMLATFA or under any laws in
G Malaysia and has thus acted *mala fide*; and

(e) The defendant has exceeded its powers under AMLATFA or has acted outside the scope of its powers and/or has acted irresponsibly with respect to the plaintiff's rights under the
H Federal Constitution and thus the defendant has acted *mala fide*.

Prayers

[9] The defendant applied under O. 18 r. 19(1)(a), (b) and (d)
I Rules of Court 2012 (ROC) to strike out the plaintiff's claim in encl. 4 in that the plaintiff's claim does not disclose a reasonable cause of action, and that it is frivolous and vexatious and an abuse of court process.

Principles

[10] New laws are required to cope with new devices used in promoting and perpetrating serious offences taking into consideration the fact that the love of money is the root of all kinds of evil and that modern technologies have allowed massive funds to be transferred instantaneously across the world. Vast and wide powers are needed to cope with and combat both money laundering and terrorism financing.

[11] Some mechanisms provided for under the AMLATFA include the use of freezing order, seizure order and forfeiture order. Appreciating that *bona fide* third parties may have their properties forfeited under AMLATFA, provisions have been made for them to be heard and for the court to be satisfied that the requirements under AMLATFA have been met for the return of their properties.

[12] The offence of money laundering not known a decade ago is now provided for under s. 4 of AMLATFA. It reads:

> Section 4. Offence of money laundering
>
> (1) Any person who:
>
> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of,
>
> money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[13] Section 29 on investigation by the competent authority and enforcement agencies reads:

> Section 29. Investigation by competent authority and enforcement agencies
>
> (1) Where:
>
> (a) the competent authority has reason to suspect the commission of an offence under Part III or IV; or

A (b) an enforcement agency having the power to enforce the law under which a related serious offence is committed has reason to suspect the commission of an offence under any other provisions of this Act,

B the competent authority or the relevant enforcement agency shall cause an investigation to be made and for such purpose may exercise all the powers of investigation provided for under this Act.

C (2) The competent authority or the relevant enforcement agency, as the case may be, may instruct any person to take such steps as may be necessary to facilitate an investigation under subsection (1).

D (3) The competent authority and the relevant enforcement agency shall co-ordinate and co-operate with any other enforcement agency in and outside Malaysia, with respect to an investigation into any serious offence or foreign serious offence, as the case may be.

Whether After The Freezing Order Has Expired And Neither The Plaintiff Not Its Directors Have Been Charged, Can The Freezing Order
E *Be Substituted By A Seizure Order*

[14] Section 44 on the "Freezing of property" under AMLATFA appears under Part VI under the title of "Freezing, Seizure and Forfeiture." It reads:

F Section 44. Freezing of property

(1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence
G under subsection 4(1) or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person, or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

H (2) An order under subsection (1) may include:

(a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such
I manner and in such circumstances, if any, as are specified in the order; and

(b) an order to authorize any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require.

(3) The enforcement agency in making the order under subsection (1) may give directions to the person named or described in the order as to:

(a) the duration of the order;

(b) the disposal of that property, for the purpose of:

(i) determining any dispute as to the ownership of or other interest in the property or any part of it;

(ii) its proper administration during the period of the order;

(iii) the payment of debts incurred in good faith due to creditors prior to the order;

(iv) the payment of money to that person for the reasonable subsistence of that person and his family; or

(v) the payment of the costs of that person to defend criminal proceedings against him; or

(vi) the manner in which the property should be administered or dealt with.

(4) An order made under subsection (1) may direct that the person named or described in the order shall:

(a) be restrained, whether by himself or by his nominees, relatives, employees or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;

(b) not remove from or send out of Malaysia any of his money or property; and

(c) not leave or be permitted to leave Malaysia and shall surrender any travel documents to the Director General of Immigration within one week of the publication of the order.

(5) An order made under subsection (1) *shall cease to have effect after ninety days from the date of the order, if the person against whom the order was made has not been charged with an offence under this Act* or a terrorism financing offence, as the case may be.

A (6) An enforcement agency shall not be liable for any damages or cost arising directly or indirectly from the making of an order under this section unless it can be proved that the order under subsection (1) was not made in good faith.

B (7) Where an enforcement agency directs that frozen property be administered or dealt with, *the person charged with the administration of the property shall not be liable for any loss or damage to the property or for the cost of proceedings taken to establish a claim to the property or to an interest in the property unless the court before which the claim is made* finds that the person charged with the administration of the C property has been **negligent** in respect of the administration of the property. (emphasis added)

[15] The defendant's argument is that though neither the plaintiff nor its directors have been charged for an offence under AMLATFA, the freezing order does not expire at the end of the D 90-day period as Mercantile Point Sdn Bhd and its directors have been charged for an offence under AMLATFA.

[16] The plaintiff on the other hand submitted that s. 44(5) AMLATFA is clear in that the freezing order was directed at the E plaintiff and its directors and since both have not been charged for any offence under AMLATFA after the expiry of 90 days from the freezing order and even until now, the order would automatically expire. The result is that the plaintiff would be free to deal with the properties under its name and to dispose them F of to any purchasers interested as the plaintiff is a developer and with a loan outstanding against the bank and secured over the properties, it is daily "bleeding" under the pain of interest incurred without income coming in to fully discharge it as the properties could still not be sold for so long as the freezing order is still G operative or as in this case, being substituted by a seizure order.

[17] If the plaintiff's argument be true, then it would mean that the defendant has exceeded its powers under AMLATFA or that it has been negligent in misconstruing the scope of its powers or H worse still, it has not acted in good faith. It is not a totally frivolous or unmeritorious argument on the part of the plaintiff with respect to the way the defendant has persisted in substituting the freezing order with a seizure order under s. 51 of AMLATFA when neither the plaintiff nor its directors have been charged for I an offence under AMLATFA.

[18] The question of whether the defendant has acted in good faith or that it has exercised its powers unreasonably or even exceeded its powers is certainly a matter that can only be decided after parol evidence is adduced at the trial and not a matter that can be decided at this stage. To shut the plaintiff out at this stage would be to leave the plaintiff without an opportunity to ventilate its grievance and perhaps even to be vindicated at the trial though that at this the court need not be concerned of its likelihood of victory save that the action must not be completely frivolous and vexatious. If need be, a serious question of law may be framed for determination under O. 32 r. 2 ROC which determination will dispose of the whole of the plaintiff's claim or a substantial part of it.

[19] Learned counsel for Bank Negara Malaysia (BNM), the defendant herein, Miss Jasmina Binti Mohd Mokhtar, argued that there is an inbuilt checks and balances mechanism under s. 51 of AMLATFA in that the Public Prosecutor must be satisfied before an order is issued at the request of the defendant and that this court should not interfere with the exercise of that prosecutorial discretion, being satisfied that the properties are the subject matter of an offence under the AMLATFA.

[20] Section 51 provides as follows:

> Section 51. Seizure of immovable property
>
> (1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that **any immovable property** is the **subject-matter of an offence under subsection 4(1)** or a terrorism financing offence or evidence of the commission of such offence, or is terrorist property, such property may be seized, and the seizure shall be effected:
>
> (a) by the issue of a Notice of Seizure by the Public Prosecutor setting out the particulars of the immovable property which is seized in so far as such particulars are within his knowledge, and **prohibiting all dealings in such immovable property**;
>
> (b) by publishing a copy of such Notice in two newspapers circulating in Malaysia, one of which shall be in the national language and the other in the English language; and
>
> (c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land

A

> Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land titles, as the case may be, in Sarawak, of the area in which the immovable property is situated. (emphasis added)

B **[21]** The last thing the court would want to do is to interfere with such a discretion exercised presumably based on the facts before him. However here we are concerned about what is the remedy open to an aggrieved person like the plaintiff who is at the receiving end of the brunt and burden of the freezing and/or seizure order when it is not the one who has been charged but C one of its purchasers in a housing development project who has failed to pay the balance purchase price towards the purchase and which S&Ps have been terminated. The case of *Khor Peng Chai & Ors v. Bank Negara Malaysia & Anor* [2012] 4 CLJ 987 can be distinguished as there it concerned an application by way of D judicial review to quash a freezing order whereas here, the freezing order had expired after 90 days and it was substituted by a seizure order and further the forfeiture hearing of the subject-matter properties has been stayed.

E **[22]** It cannot be confidently said that the plaintiff is bound to fail at the trial and that this action should be terminated here and now by striking out at this stage. Even if it be an uphill task for the plaintiff to prove that the defendant has acted *mala fide*, that is no justification for striking out the suit at this stage.

F

Whether Section 54(3) Prohibits The Plaintiff's Action Read Together With The Immunity Conferred On The Defendant By Section 77

[23] Learned counsel for BNM Miss Jasmina went so far as submitting that an action of this nature cannot be brought against G the defendant as it is caught by s. 54(3) as set out below:

> Section 54. Dealing with property after seizure to be void
>
> (1) Where any property has been seized under this Act, and so long as such seizure remains in force, any dealing effected H by any person or between any persons in respect of such property, except any dealing effected under this Act by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government, or the Government of a State, or a local authority or other I statutory authority, shall be null and void, and shall not be registered or otherwise be given effect to by any person or authority.

(2) Subsection (1) shall be in addition to and not in derogation of subsections 51(3) and (4).

(3) For **so long as a seizure of any property under this Act remains in force, no action, suit or other proceedings of a civil nature** shall be instituted, or if it is pending immediately before such seizure, be maintained or continued in any court or before any other authority **in respect of the property which has been so seized**, and no attachment, execution or other similar process shall be commenced, or if any such process is pending immediately before such seizure, be maintained or continued, in respect of such property **on account of any claim, judgement or decree**, regardless whether such claim was made, or such judgement or decree was given, before or after such seizure was effected, except at the instance of the Federal Government or the Government of a State, or at the instance of a local authority or other statutory authority, or except with the prior consent in writing of the Public Prosecutor. (emphasis added)

[24] I do not read s. 54(3) as prohibiting this very action of the plaintiff in challenging the very legality of the scope of application of the freezing and/or seizure order as to allow such an interpretation would be to remove the exercise of such a power from the scrutiny of the courts altogether. It can only take precedence over other unrelated actions that happened to involve the same subject-matter properties such as a judgment obtained by a certain judgment creditor against the subject-matter properties in the name of the accused person for which execution has been issued or an action for specific performance by Mercantile Point Sdn Bhd against the plaintiff for instance. It cannot prevent a challenge mounted by the registered owner of the subject-matter properties who is aggrieved by the order where it has not been charged until now for any offence under the AMLATFA. Section 54(3) must be read subject to s. 77 where even the cloak of immunity would only cover circumstances where the exercise of the vast powers by the defendant under AMLATFA has been in good faith. Section 77 reads:

No action, suit, prosecution or other proceedings shall lie or be brought, instituted, or maintained in any court or before any other authority against:

(a) **the competent authority** or **the relevant enforcement agency**;

A (b) any director or officer of the competent authority or the relevant enforcement agency, either personally or in his official capacity; or

(c) any person lawfully acting in compliance with any direction, instruction or order of a director or officer of the competent
B authority or the relevant enforcement agency,

for or on account of, or in respect of, any act done or statement made or **omitted to be done or made, or purporting to be done or made or omitted to be done or**
C **made**, in pursuance of or in execution of, or intended pursuance of or execution of, this Act or any order in writing, direction, instruction or other thing issued under this Act if such act or statement was done or made, or was omitted to be done or made, **in good faith**. (emphasis added)

D

[25] If the defendant is heard correctly and carefully, it is saying that the remedy of the plaintiff lies in s. 61 which respect to a claim that may be made by a *bona fide* third party claimant pursuant to a forfeiture order issued by the Sessions Court that
E had convicted the accused persons. However, as pointed out by Mr Shivdev Singh for the plaintiff, the sentence has been stayed by the Sessions Court and with that the hearing of the forfeiture of the subject-matter of the offence in the properties have not been heard yet and is still pending under s. 55 of AMLATFA.
F Section 55 reads:

Section 55. Forfeiture of property upon prosecution for an offence

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1), or a terrorism financing offence, **the court shall**
G **make an order for the forfeiture of any property** which is **proved to be the subject-matter of the offence or to have been used in the commission of the offence** or which is proved to be terrorist property where:

(a) the offence is proved against the accused; or

H

(b) the offence is not proved against the accused but the court is satisfied:

(i) that the accused is not the true and lawful owner of such property; and

I

(ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.

(3) **In determining whether the property is the subject-matter of an offence or has been used in the commission of an offence** under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply **the standard of proof required in civil proceedings**. (emphasis added)

[26] Section 61 on the rights of *bona fide* third parties reads as follows:

Section 61. *Bona fide* third parties

(1) The provisions in this Part shall apply **without prejudice to the rights of *bona fide* third parties**.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) *shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.*

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:

(a) the **claimant has a legitimate legal interest** in the property;

(b) **no participation, collusion or involvement with respect to the offence** under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the **claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use**;

A (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

B (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property. (emphasis added)

[27] It would appear that the plaintiff has found itself in a catch-22 situation where it cannot apply under AMLATFA for the C subject-matter properties to be returned to it as the hearing of the forfeiture is still pending under s. 55 and indeed would not be heard as there has been a stay of the sentence of the accused persons pending their appeal and at the same time the order is still operative with the consequence that the plaintiff would suffer D irreparable harm and damage in that it does not know for how long it has to wait.

[28] Whilst the competent authority or enforcement agency under AMLATFA is presumed to have acted in good faith, that presumption is a rebuttable one. I am not prepared at this stage E to say that or to infer from the circumstances of the case that the plaintiff has not proceeded in good faith or that it has abused the process of court by bringing this action which essentially is an action in tort whether it be for negligence or misfeasance on the part of the defendant. It may well be that it would be difficult for F the plaintiff to succeed at the trial to show a lack of *bona fide* on the part of the defendant but that is not sufficient cause for striking out this suit at this stage.

[29] The plaintiff's grievance is a genuine one for it does not G know for how long it has to wait before the subject-matter properties could be released from the order. Whilst patience is undeniably a virtue, must it resign to just wait patiently until the appeal of the accused persons is disposed of and then to activate the provision of s. 61 and to prove that it meets the requirements H of s. 61(4)? The order was issued on 23 September 2008 in exh. D2 in encl. 4. It has been nearly five years wherein the plaintiff could not deal with the subject-matter properties. Must the plaintiff resign to the fact that any delay is due to mere administrative delay in a conviction to be heard on appeal pending a stay?

I

[30] Whether or not the defendant's action or inaction is completely above board and *bona fide* is something that the plaintiff under the circumstance of this case, is legitimately and legally entitled to call upon the court to scrutinise.

[31] In an era of accountability, transparency and openness, the greater the rigours and reach of one's power, the more prepared must one be for the exercise of the power to be scrutinised by a court of law for the court is the final arbiter of a dispute between the enforcement agency and the person receiving the full brunt of the law.

[32] The defendant is not hampered in any way in the exercise of its powers under AMLATFA for the order is still operative but the defendant must be prepared to have the searchlight of reason and reasonableness brought to bear on its actions or inaction.

Whether The Plaintiff's Action Should Lie In A Judicial Review Action And Not In A Civil Suit

[33] The submission of learned counsel for BNM is that the challenge of the plaintiff against BNM is essentially an action in public law against a statutory body charged with enforcing a public duty of enforcing the AMLATFA. It should thus be by way of an application for judicial review where leave must first be sought and obtained from the court within the prescribed time frame. However the doubts created over the dichotomy between a public-private law remedy have been clarified and cleared by the Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. It has declared once again the true position of the law in the continuing private law-public law debate. I must quote *in extenso* the speech of his Lordship James Foong FCJ at pp. 896-897:

> Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O. 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman*). However, O. 53 of the RHC sets out a specific

A procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in
B O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* and repeated in YAB Dato' Dr Zambry. However, like all
C general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to '**particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private** law or where none of the parties
D objects to the adoption of the procedure by writ, or originating summons'. Then of course **there is the exception for a claim against the public authority for negligence** as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v. Mackman*. The
E circumstances in YAB Dato' Dr Zambry is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 of the
F RHC. (emphasis added)

[34] Here the cause of action is essentially that of the tort of misfeasance against a public authority. As was observed some time ago in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon*
G *& Ors* [2006] 2 CLJ 1 the Federal Court speaking through his Lordship Steve Shim CJ (Sabah & Sarawak) at p. 28 said:

The Respondents' claim for negligence by way of writ action is perfectly proper in law. In my view, the Court of Appeal has erred in holding that the respondents' only recourse against MPAJ
H lay in the area of public law by way of judicial review. I may add that at the time the Respondents filed this present action, the public law remedy of judicial review under Order 53 of the Rules of High Court 1980, did not permit the recovery of damages. Hence, **it is not inappropriate for the respondents to proceed**
I **by way of writ action which they did**. (emphasis added).

[35] Even if there is a public law element in what is essentially a private law claim, I would recall the words of His Lordship James Foong FCJ in *Ahmad Jefri*'s case (*supra*) at p. 898:

> If it (the claim) is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under Order 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under Order 53 RHC is not suitable.

[36] In the case of *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581 the High Court held that the order of the deputy public prosecutor is not reviewable under O. 53 of the Rules of the High Court 1980 with respect to the issuing of a seizure order under s. 50(1) of AMLA. However here the plaintiff has not proceeded by way of a judicial review application but by way of an action for the tort of misfeasance.

[37] Here I would say the claim is by the plaintiff for recovery of the subject-matter properties which are registered in the plaintiff's name and where the S&Ps for the purchase of the properties have been terminated. The continued enforcement of the seizure order has the effect of paralysing the plaintiff's business as a developer; it cannot discharge the charge over these properties and further it cannot sell these properties to other purchasers with the result that there is no cash flow but a credit crunch of calamitous proportion. The plaintiff continues to suffer under the seizure order and the opportunity to make representation under a Forfeiture proceeding under AMLATFA has not begun. Its stand that the defendant's refusal to relent is an abuse of its powers under AMLATFA in that the defendant has acted *mala fide* is a matter that the plaintiff should be allowed to proceed and prove at the trial.

Whether The Plaintiff's Claim In All The Circumstances Of The Case Ought To Be Struck Out At This Stage

[38] The *cause célèbre* of the law on striking out under O. 18 r. 19(1) ROC must certainly be the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11; [1993] 3 MLJ 36 where at pp. 43-44 it states the broad principles as follows:

> The principles upon which the Court acts in exercising its powers under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in **plain and obvious cases** that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91) and this summary procedure can only be adopted when it can be clearly seen that a **claim or answer is on the face of it "obviously unsustainable"** (Attorney-General of Duchy of *Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and the facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.) **The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2** (which is *in pari materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson*) (*supra*). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis added)

[39] As for the meaning of "no reasonable cause of action" and "frivolous and vexatious" and "an abuse of the process of the court", these have been compendiously explained in *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 4 CLJ 857 at p. 861; [1994] 3 MLJ 691 by His Lordship Abdul Malik Ishak J (as he then was) at pp. 698-699 as follows:

> No reasonable cause of action
>
> It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegations in the pleadings are being considered (*Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094; [1970] 1 WLR 688, CA). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v. Moloney* [1965] 2 All ER 871; [1965] 1 WLR 1238). There are several instances where the statement of claim will be struck out and the action dismissed, eg in an action of contract if it appears that there is no contract between the parties or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the court which has no power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co v. Haswell, Shotton & Easington Coal and Coke Co* [1898] 1 Ch 465; *Humphrys v. Polak* [1901] 2 KB 385; *Shaw v.*

Shaw [1965] 1 All ER 638; [1965] 1 WLR 537; *Wing v. Burn* (1928) 44 TLR 258 and *Johnston v. Johnston* (1884) 33 WR 239, CA).

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as would amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *A-G of the Duchy of Lancaster v. London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v. A-G* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v. Holloway* [1895] P 87).

Abuse of the process of the court

It is said that the process of the court must be used *bona fide* and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v. Murray* (1875) 10 Ex 213).

[40] With respect to the first limb of "no reasonable cause of action" I must proceed on assuming as true the various allegations of misfeasance on the part of the defendant. Premised on that it cannot be said that the plaintiff's claim is obviously unsustainable or that it is plain and obvious that it should be struck out at this stage. It is not a complete non-starter. It may be weak or that it may be a steep mountain climb to be able to prove misfeasance on the part of BNM, but that is a separate thing altogether. Whether or not BNM has exceeded its powers or exercised it unreasonably and thus *mala fide* is a matter that can only be established at the trial where the evidence of the defendant will be subject to cross-examination. Not to allow the plaintiff to have its day in court would be to send the wrong message out that one can never successfully challenge the exercise of powers by a public authority. Here it is not about a prosecutorial discretion to prosecute or not to prosecute but a discretion to continue with a seizure order that would affect the rights of an innocent third party who is not charged for any offence and who is prepared to

prove in court that it is not a party or privy to the offence committed by Mercantile Point Sdn Bhd and its directors. Whilst s. 61 might be available to an innocent third party to make representations against the forfeiture of his properties, in this case it is not available as there has been a stay of the sentence passed on the accused persons including a stay of the forfeiture order. I cannot accept that the only remedy that the plaintiff has is to wait for the appeal by the accused persons to be heard and then, depending on the outcome, to then proceed with the hearing against forfeiture under s. 61 of AMLATFA. Whilst waiting patiently for that to pass is a valid option I do not think that the plaintiff should be prevented from pursuing a more proactive approach in bringing an action for a declaration that the freezing order and/or seizure order is invalid and that the plaintiff is entitled to sue for damages arising out of the misfeasance of the defendant.

[41] As regards the limb of "frivolous and vexatious", again it cannot be said that an action arising out of a genuine grievance against the action of an enforcement agency can be said to be "frivolous and vexatious". It goes without saying that the greater the power the greater the need to be accountable for the exercise of that power and when an action is brought by someone who claims to be innocent and to be suffering from the exercise of such a vast power as that of seizure of a subject-matter property, surely his claim cannot go unheard. The plaintiff cannot be told that it was rather unfortunate for it to have dealt with Mercantile Point Sdn Bhd who together with its directors were convicted of money laundering and that though it may have to suffer under the seizure order, it is just too bad for having dealt with a money launderer without knowing him to be one! To allow the suit to be struck out now would be to tell the plaintiff precisely that.

[42] Again the plaintiff's suit cannot be said to be an abuse of the process of the court. The court is always there for all and sundry to knock on its doors, pay the filing fees and file his claim provided he has a legitimate complaint and a cause of action. There are sufficient deterrence in terms of being mulct in costs if the claim is later dismissed after a trial. The plaintiff here is perfectly entitled to turn to the court and ask of it to interpret the scope of the relevant provisions on freezing order, seizure order and forfeiture order in particular ss. 44, 51, 54, 56, 61 and

77 to name but a few and to determine if the defendant has exceeded its powers under the relevant provisions of AMLATFA. Whether it can obtain the declaration prayed for is a separate thing altogether. Whether it can succeed in claiming the damages prayed for is to be left for trial. What it wants is primarily for the seizing order to be lifted so that it may proceed with its normal business of being able to dispose the 215 titles. I cannot see how that can be said to be an abuse of the process of the court. Litigation is sometimes necessary so that relevant provisions of the law especially provisions that have far reaching consequences on an innocent third party may be interpreted by the courts and the law developed as a result.

[43] It would be instructive for us to see the approach taken by the House of Lords in *Ashley v. Chief Constable of Sussex Police (Sherwood intervening)* [2008] 2 WLR 975, when faced with a defendant's application to strike out the claim of the claimants for assault and battery. The claimants, the father and son of the deceased, brought actions as dependants under the Fatal Accidents Act 1976 and for the benefit of the deceased's estate under s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 against the chief constable of the defendant police force for damages for, *inter alia*, assault and battery, negligence and false imprisonment in respect of the planning and execution of the raid. It transpired that when the police raided the deceased's flat in the early hours of the morning with a warrant to search for drugs, he was shot and killed by a police officer who claimed to have acted in self-defence. During the raid the deceased was naked and unarmed. The officer was charged with the deceased's murder but on the judge's direction was acquitted owing to the absence of any evidence to negate his assertion of self-defence. The defendant admitted liability in negligence and false imprisonment and agreed to pay all damages flowing from the incident but resisted the assault and battery claim on the basis that the officer had acted in self-defence and applied for it to be struck out. The judge held that the burden of proving that the police officer had not acted in self-defence lay on the claimants and that, given the lack of evidence at the criminal trial to disprove the officer's belief that he had been in imminent danger of attack, the claim had no real prospect of success and was to be struck out. On the claimants' appeal, the Court of Appeal, holding that in a civil law action the burden was on the defendant to prove not only honest belief that he had been under threat of imminent attack but also the

reasonableness of that belief, and that therefore it could not be said that the claim had no real prospect of success, by a majority allowed the battery claim to proceed to trial notwithstanding that the chief constable's concession on damages precluded any additional damages being payable. The police appealed to the House of Lords.

[44] As summarised in the headnotes at p. 975 it was held as follows in the House of Lords:

> Held, dismissing the appeal, (1) that, although a defendant was entitled to be acquitted of a charge of assault, manslaughter or murder if he had acted in the honest but mistaken belief that he had been under threat of imminent attack, since the function of the civil law was to provide a framework which held the balance between the conflicting rights and interests of different people such a belief was not sufficient to establish self-defence as a defence to a tortious claim for assault and battery if that belief had not been reasonably held (post, paras. 2-3, 17-18, 30, 53, 73, 76, 85-87, 135).
>
> (2) That the claimants had an arguable claim in assault and battery which, since it raised issues different from those on which the criminal trial had turned, could proceed without constituting a collateral attack on the officer's acquittal, and which (per Lord Scott of Foscote and Lord Neuberger of Abbotsbury), in so far as it was being pursued for the purpose of vindicating a contention that the victim's death had been caused by unlawful battery rather than for the purpose of obtaining compensation, could nevertheless be pursued "for the benefit of" the deceased's estate within the meaning of section 1(1) of the 1934 Act; and that (Lord Carswell and Lord Neuberger of Abbotsbury dissenting) the claim was not to be prevented from proceeding to trial by reason of the facts that it could not result in the award of further compensatory damages and was being pursued in order to vindicate the claimants' contention that the police officer had unlawfully killed the deceased (post, paras. 2, 4, 22-24, 27, 28-29, 30, 62-63, 66, 71, 73, 79, 103, 107, 114).

[45] Lord Bingham of Cornhill had this to say with respect to a claim in tort arising out of the exercise of the police power of investigation and arrest at pp. 983-984:

> 18 The function of the civil law of tort is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular **the law of tort,**

> **must then strike a balance between the conflicting rights**. Thus, for instance, the right of freedom of expression may conflict with the right of others not to be defamed. The rules and principles of the tort of defamation must strike the balance. The right not to be physically harmed by the actions of another may conflict with the rights of other people to engage in activities involving the possibility of accidentally causing harm. **The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence**. As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. **The balance struck is serving a quite different purpose from that served by the criminal law** when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions ... (emphasis added)

[46] In the present case the plaintiff is bringing a claim for the tort of misfeasance and the issue as to whether the defendant has acted reasonably and in good faith can only be ascertained at the trial where on the face of the conflict in affidavits evidence there is a real dispute as to how and where the balance of rights is to be drawn between the right of the plaintiff to dispose of its properties and that of the defendant to seize and subsequently to forfeit it on ground that the plaintiff had received some 40% of the purchase price for it.

[47] As for the prospect of success Lord Bingham put it thus at p. 988:

> 27...But if it is right, as I think it is, that self-defence in a tortious assault and battery claim requires not only an honestly held belief but also, at the very least, *a reasonably held belief in the existence of the facts said to justify the action taken as being reasonable and proportionate in the believed circumstances, it is, in my opinion, impossible to conclude that the Ashleys' pleaded case has no real prospect of success*. The deceased Mr Ashley, while naked and unarmed, was shot by PC Sherwood within seconds of the latter's entry at 4.20am or thereabouts into the bedroom. The question whether in all the circumstances it was reasonable for PC Sherwood to have believed that the figure facing him was armed and was presenting a deadly danger is, to me at least, an open one on the facts. (emphasis added)

[48] Applying by way of analogy the above *dicta* to the present case, it is impossible to conclude that the plaintiff's pleaded case has no prospect of success at this stage. Even if the plaintiff's claim is not elegantly worded, the plaintiff may still apply for leave of the court to amend the pleadings accordingly. Whether or not the plaintiff must suffer the whole of the subject-matter properties to be forfeited or to be the subject of a forfeiture proceeding which has now been stayed when only 40% of the purchase price has been paid and there is default on payment of the balance such that the plaintiff has terminated the S&Ps, is something that the defendant has to justify in court at the trial to show if it has acted *bona fide* in all the circumstances of the case taking all relevant factors into consideration.

[49] Even though Lord Neuberger was part of the minority that decided to stay the battery claim at the House of Lords, yet his observation on the need for declaratory reliefs quite apart from judicial review is a breath of fresh air in this growing field of jurisprudence. At p. 1008 His Lordship observed as follows:

> 114 First, there is, at least potentially, a substantial public interest in the outcome of the battery claim. If the claim does not proceed, there will, with the exception of a criminal trial, where the prosecution failed to make out its case, never be a full scrutiny or judicial (or quasi-judicial) assessment in public of what happened on 15 January 1998.
>
> 115 The constitutional and public interest aspects of the court's functions in the present connection are identified by the editors of Clerk & Lindsell on the *Law of Torts*, 19th edn. (2006), para. 1-10, where they emphasise that "**tort law protects a wide range of interests against harmful conduct and that protection is not limited to compensation**". The editors go on to say that "**in many situations it is the publicity resulting from an action which may do most to protect rights" and that "Tort law may serve as an 'ombudsman' function in this respect**". To similar effect, in Governor and Company of the *Bank of Scotland v. A Ltd* [2001] 1 WLR 751, para. 45, Lord Woolf CJ cited with approval an extra-curial observation of Lord Denning about "*the need" for the court to develop the scope of its declaratory jurisdiction "in order to control the abuse of executive power", going on to emphasise that the "development of declaratory relief has not however been confined to judicial review*". (emphasis added)

Pronouncement

[50] Every power has to be exercised reasonably and in a *bona fide* fashion and if there is any accusation of an unreasonable exercise of vast powers and any allegation of a lack of *bona fide* in the exercise of such a power, that must surely be met by a complete revelation of the material facts that would impinge on the defendant's decision to issue a seizure order after the expiry of a freezing order.

[51] It would enhance transparency and accountability in line with the citizens' clamour for and the government's acceptance of a more accountable exercise of power vested by parliament on the executives and its agencies where the citizens' rights are concerned.

[52] Here is one company whose business is said to have suffered irreparably because of a so-called exercise of *bona fide* powers by the defendant under AMLATFA.

[53] Even the protection of immunity conferred on the defendant under s. 77 is only if the powers have been exercised *bona fide*. Surely that cannot be decided by way of affidavits' evidence in the factual matrix of this case.

[54] I am more than convinced that the plaintiff must be allowed its day in court.

[55] The application to strike out the plaintiff's claim under O. 18 r. 19(1)(a), (b) and (d) ROC was thus dismissed with costs in the cause.